

Hearing:  
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re American Bio Medica Corp.

Serial No. 75/188,002

Edmund M. Jaskiewicz for American Bio Medica Corp.

John E. Michos, Trademark Examining Attorney, Law Office 105  
(Thomas G. Howell, Managing Attorney).

Before Cissel, Hanak and Quinn, Administrative Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

American Bio Medica Corp. (applicant) seeks to register on the Supplemental Register the term RAPID DRUG SCREEN for "urine test cards for detecting the presence of narcotics." The application was filed on October 24, 1996 with a claimed first use date of May 1996.

The Examining Attorney has refused registration on the basis that RAPID DRUG SCREEN is one generic term for applicant's goods, and hence pursuant to Section 23 of the Trademark Act is incapable of distinguishing applicant's goods from similar goods manufactured by others.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs and were present at a hearing held on August 3, 2000.

It is beyond dispute that "the burden of showing that a proposed trademark is generic remains with the Patent and Trademark Office." In re Merrill Lynch, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). Moreover, it is incumbent upon the Examining Attorney to make a "substantial showing ... that the matter is in fact generic." Merrill Lynch, 4 USPQ2d at 1143. Indeed, this substantial showing "must be based on clear evidence of generic use." Merrill Lynch, 4 USPQ2d at 1143. Thus, "a strong showing is required when the Office seeks to establish that a term is generic." In re K-T Zoe Furniture Inc., 16 F.3d 390, 29 USPQ2d 1787, 1788 (Fed. Cir. 1994). Moreover, any doubt whatsoever on the issue of genericness must be resolved in favor of the applicant. In re Waverly Inc., 27 USPQ2d 1620, 1624 (TTAB 1993).

In this case the Examining Attorney has failed to make of record sufficient competent evidence demonstrating that the phrase RAPID DRUG SCREEN has been used in a generic sense. In short, the record falls short of the required "clear evidence of generic use." Merrill Lynch, 4 USPQ2d at 1143.

At page eight of his brief, the Examining Attorney states that the "most persuasive part of the evidentiary record is the

demonstration that the wording RAPID DRUG SCREEN for which applicant seeks registration is, in fact, in use by others in its proper form as a generic name for a category of drug screen."

The Examining Attorney then identifies two excerpts of stories which he contends demonstrate that the phrase RAPID DRUG SCREEN is used by others in a generic manner for a category of drug tests. However, these two excerpts simply do not support the Examining Attorney's contention. The first excerpt taken from the November 27, 1998 issue of The Daily Oklahoman does not use the term "rapid drug screen," but rather uses the term "rapid drug-screening." The second excerpt is not from a publication, but rather is a mere wire service release. Such wire service releases are entitled to very little, if any, evidentiary weight. In re Professional Tennis Council, 1 USPQ2d 1917, 1918 n.5 (TTAB 1986).

Applicant has introduced in their entirety two detailed reports discussing, among other things, drug test kits which can provide results in a prompt manner. One report is entitled U.S. Home Diagnostic and Monitoring Device Markets (1998) and the other report is entitled The Market for Rapid In Vitro Diagnostic Tests (1999). In essence, these detailed reports demonstrate that drug testing kits, which provide prompt results, have been in wide spread use since the early 1990's. If the term RAPID DRUG SCREEN was truly a generic term for "urine test cards for detecting the presence of narcotics," then there would likely be

in the vast NEXIS database many references to this term wherein it is used in a generic manner. Instead, we have not a single instance where the term RAPID DRUG SCREEN has been used in a publication in a generic manner.

These facts alone are sufficient to, at a minimum, raise doubts as to whether the term RAPID DRUG SCREEN is indeed a generic term for "urine test cards for detecting the presence of narcotics." In re America Fertility Society, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999). As noted earlier in this opinion, when there are doubts on the issue of genericness, said doubts are resolved in applicant's favor. Waverly, 27 USPQ2d at 1624.

However, we need not stop here. The record in this case is replete with numerous articles and reports wherein the term RAPID DRUG SCREEN is used as a trademark to identify applicant's particular urine test cards for narcotics. The two reports just previously discussed contain comparisons to various products similar to applicant's. In these reports, the only drug test product referred to as RAPID DRUG SCREEN is applicant's product. Moreover, these reports depict applicant's mark with initial capital letters, thus, "Rapid Drug Screen." Finally, these reports describe competing test kits and list their trademarks, such as RAPID ONE and QUICKSCREEN. Indeed, even the Examining Attorney made of record a dozen articles from the NEXIS database wherein the term RAPID DRUG SCREEN is depicted with initial

capital letters and is clearly used to refer to applicant's particular drug test kit.

One final comment is in order. The Examining Attorney has made of record numerous articles wherein the term "drug screen" appears. Many of these articles also contain the word "rapid," albeit not immediately preceding the term "drug screen." These articles demonstrate that "drug screen" is a generic term for applicant's goods. The terms "drug screen" and "drug test" are synonyms. These articles also demonstrate that the word "rapid" is highly descriptive of certain drug screens, namely, those that provide results in a matter of minutes.

Nevertheless, in view of the teachings of American Fertility Society, we can not hold on this record that "rapid drug screen" is generic for applicant's goods given the facts that (1) there is no evidence of generic use of "rapid drug screen" in its entirety, and (2) there is evidence of use by third parties of RAPID DRUG SCREEN as a trademark for applicant's particular urine test cards.

Decision: The refusal to register the mark RAPID DRUG SCREEN on the Supplemental Register is reversed.

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